

## REVIEW

### **The Civil War as Constitutional Interpretation**

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*Lincoln's Constitution*,  
Daniel Farber. Chicago, 2003. Pp ix, 240.

#### I. THE COMMANDER-IN-CHIEF OF A WAR OVER CONSTITUTIONAL MEANING

The world will little note, nor long remember, what academics say about the Constitution. That is, probably, as it should be. The law is made—its interpretation settled—by great events, not law review articles; by wars, not words; by presidents, not professors.

The Constitution we have today is in substantial measure the result of the single most decisive legal interpretive event of American history: the Civil War. The outcome of *Grant v Lee* resolved the most important issue of antebellum constitutional dispute—the nature of the Union—in favor of the nationalist view of sovereignty and against the South's state-sovereignty view. It was a great Civil War, not a judicial opinion, that settled this issue. It was likewise the Civil War, not any correcting judicial decision, that reversed the most egregious error of the Supreme Court up to that point in our history—*Dred Scott's*<sup>1</sup> enshrinement of slavery as a fundamental constitutional property right of (white) citizens, immune from federal interference as a matter of “due process” of law. And it was the War, not any judicial decision, that reversed the most egregious error of the framers in

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<sup>1</sup> *Dred Scott v Sandford*, 60 US (19 How) 393 (1857).

preserving and protecting slavery (to a considerable degree) in the first place.

The War worked a fundamental transformation in the legal status of slavery under the U.S. Constitution, and it defined (some would say redefined) American federalism. It did so by repudiating the South's and the Supreme Court's misappropriations of the Constitution, and also by providing the crucible for a constitutional reformation of the document itself. The result was the Union we have today and the end of slavery throughout that more perfect union. The War vindicated the North's interpretation of the original Constitution, rejecting state sovereignty and embracing instead national government authority to guarantee to the citizens of each state genuinely republican government and to every individual citizen both freedom and the privileges and immunities of equal citizenship. The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution were a great national interpretation and implementation of the Republican Form of Government and Privileges and Immunities Clauses of Article IV of the Constitution, and a repudiation of the Supreme Court's decision in *Dred Scott*—major interpretive victories won in a bloody civil war fought over constitutional meaning.

None of this would have happened if President Abraham Lincoln had not believed himself constitutionally compelled—*required*, in his view, by an “oath registered in heaven”<sup>2</sup>—to insist on his understanding of the Constitution in the teeth of the competing claims of the South and of the Supreme Court, even though doing so might mean civil war. Lincoln was the Commander-in-Chief of this great war over constitutional meaning, and both his interpretive method and his stance toward competing views were striking. Lincoln was what we today might call a pragmatic textualist in matters of constitutional interpretation. The Constitution means what the words say, in their most natural and literal sense (while allowing for both context and specialized usage). At the same time, the Constitution must be read as a whole, and read sensibly and reasonably in light of the purposes it was designed to serve. Thus, particular phrases should not be read so as to defeat the basic enterprise of constitutional government. For Lincoln, his duty as President was *controlled* by such a fair and reasonable (and non-self-destructive) reading of the Constitution's text—chiefly because the Constitution seems to *say*, in the Presidential Oath Clause, that that is the President's duty. And, Lincoln believed, that sworn presidential duty cannot be abandoned or compromised because of the misguided and destructive views of other

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<sup>2</sup> Abraham Lincoln, *First Inaugural Address* (Mar 4, 1861), in Don E. Fehrenbacher, ed., *Abraham Lincoln: Speeches and Writings, 1859–1865* 215, 224 (Library of America 1989).

constitutional actors. Lincoln thus set himself against any attempt to subordinate the nation's Constitution (as he understood it) to the peculiar views of individual states, or even to the decisions of the Supreme Court, when such views were destructive to the nation whose Constitution he had sworn to "preserve, protect and defend."<sup>3</sup>

Given the centrality of Lincoln and the Civil War to the constitutional order we have today, it is little short of incredible how little attention modern scholarship pays to the Civil War as an event of constitutional interpretation or to Lincoln as a constitutional interpreter. In part, this neglect is a byproduct of the Langdellian "case" method of teaching and study, with its reliance on written judicial opinions producing the occupational habit (and hazard) of thinking of the law solely in terms of such opinions.<sup>4</sup> But this cannot be a sufficient explanation. The constitutional issues framed by the Civil War provide excellent case studies appropriate to the case method, and Lincoln produced great legal texts worthy of study alongside the most classic of judicial opinions. The neglect might, in part, be more ideological. Courts, and especially the Supreme Court, are not the heroes of this story, but the villains. The actions of the judiciary are embarrassing, and such embarrassment is not in keeping with the dominant modern paradigm of constitutional law, which casts courts as heroes and political actors as villains. Moreover, the actions of President Lincoln defied judicial supremacy, sometimes bordered on authoritarian, and occasionally sacrificed individual liberty on the altar of necessity, emergency, and national survival—also themes out of favor among most modern constitutional scholars.

Or the neglect might simply reflect the passage of time. The issues of nearly a century and a half ago are not—or at least are not all—the specific issues of today. Constitutional scholarship today tends to focus on yesterday's Supreme Court decision and tomorrow's pending case, ignoring, to our detriment, the more fundamental shaping of the Constitution through great historical events in favor of the study of the latest doctrinal ripples in Supreme Court decisions of middling importance.

Whatever the reason for the neglect of Lincoln and the Civil War, Professor Dan Farber has stepped into the void to correct it, with a learned, subtle book about the constitutional controversies of Lincoln's time. *Lincoln's Constitution* should be much noted and long remembered. It deserves a wide audience—wider, probably, than it

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<sup>3</sup> US Const Art II, § 1, cl 8.

<sup>4</sup> When once before I made oblique reference, with irony, to the "case" of *Grant v Lee* (Appomattox Court House 1865) in a footnote to an academic article, the law review editors asked me to provide a case reporter citation, as they had not been able to find it on Westlaw or Lexis.

will receive—as an academic and at times (as the author himself concedes) “a bit abstruse” (pp 26, 184) treatment of its topics. Professor Farber’s insights are unfailingly intriguing (even when his conclusions are debatable) on such topics as interposition, secession, war powers, emancipation, and suppression of civil liberties in time of war. Some of these topics are no longer matters of current constitutional controversy. Others, like war powers and civil liberties, are unexpectedly central to the constitutional life of the nation today. All are critical to understanding the Constitution we have today, and Farber’s book does a great service in bringing to this undeservedly ignored and undeniably important period of constitutional history both the attention it merits and his considerable insight into it.

In Part II of this Review, I sketch Farber’s project, praise its general excellence, and note its limitations. As excellent as the book is, Farber more than occasionally falls victim to modern constitutional conceptions and prejudices favoring reflexive nationalism and unquestioning acceptance of judicial supremacy in constitutional interpretation—conceptions and prejudices *not* shared by Lincoln—with the consequence that *Lincoln’s Constitution* is sometimes *Farber’s Constitution*, more than it truly is Lincoln’s.

In Parts III through V, I address three large constitutional questions framed by Lincoln and the Civil War, building on Farber’s discussion and taking issue with certain of his conclusions. The first question (Part III) concerns the notions of interposition, nullification, and secession: does a state properly possess an independent power of constitutional interpretation and, if so, does that permit secession as a remedy for a perceived violation of the Constitution by the national government? The correct answer, I submit, is Lincoln’s (not Farber’s): no state has a unilateral constitutional right to secede *that the nation as a whole is bound to honor*. But that does not mean that a state might not possess, in theory and in propriety, the right to resist, with the powers at its disposal, a very serious breach of the Constitution by the national government. Lincoln never argues any differently. Rather, Lincoln’s consistent position was that, *on the merits*, the South simply did not have a legitimate case that such a violation of the Constitution had occurred in fact by virtue of Lincoln’s election and his constitutional views with respect to slavery and the (un)authoritative status of *Dred Scott* as binding law for the nation. Farber’s Lincoln is too strongly nationalist on the question of state interpretive power, looking more like the elderly James Madison or Daniel Webster (or like Farber himself). The real Lincoln was more concerned with whether the South’s constitutional interpretations were *correct* or not.

The second question (Part IV) builds on the discussion of the first and is framed by the Supreme Court's decision in *Dred Scott* and Lincoln's response to it as a candidate for Senate in 1858, as a candidate for President in 1860, and as President during the Civil War: are the federal judiciary's interpretations of the Constitution authoritative and binding on all other actors in our constitutional system? Lincoln's answer was a reluctant, at times inconsistent, but increasingly definite, *No*—a point with which Farber, a committed modern judicial supremacist, has considerable difficulty. Farber ends up uncomfortably defending a presidential duty to follow *Dred Scott* and to obey judicial decrees even where they are hideously wrong and even where they might threaten the continued existence of the Union. Again, I side with Lincoln against Farber: the President's duty to the Constitution does not permit him (much less require him) to sacrifice the Constitution, or the nation whose Constitution it is, to the wrong-headed views of the Supreme Court.

The third question (Part V) is as vital today as it was in Lincoln's day. In Lincoln's words, "Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?"<sup>5</sup> Farber chooses the traditional liberal horn of the dilemma, coming down on the side of civil liberty but generally not judging Lincoln too harshly on this score. Again, I prefer to defend Lincoln's view on its own terms: for Lincoln, the imperative constitutional duty of the President to "preserve, protect and defend" the nation whose Constitution it is, operated as a meta-principle of constitutional interpretation, affecting how every other provision should be interpreted. This is a remarkable, even extraordinary—and eminently defensible—view, and one with implications as important for the world after September 11, 2001 as for the world after April 12, 1861.

## II. FARBER'S CONSTITUTION AND FARBER'S LINCOLN

*Lincoln's Constitution* is an outstanding book—brimming with insights, scholarly but unpretentious, readable and entertaining, even charming at times. It is in every respect a greatly satisfying work. The fact that I disagree with some of its points, or would have emphasized some points far more and others far less, does not detract from the book's excellence. It merely says that not everyone would have chosen to write the same book in the same way.

Farber's treatment of the constitutional issues surrounding the Lincoln presidency hits essentially all of the relevant themes: the constitutionality of secession (Chapters 1 and 4), in light of competing

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<sup>5</sup> Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in Fehrenbacher, ed., *Speeches and Writings, 1859–1865* 246, 250 (cited in note 2).

antebellum notions of state-versus-national sovereignty (Chapter 2), including early Supreme Court decisions touching such themes (Chapter 3); the constitutional power of the federal government to act to coerce the South to remain in the United States (Chapter 5), and of the President to act on his own initiative in this regard, pursuant to broad notions of “executive power” to enforce the laws and equally broad notions of presidential power as “Commander in Chief” of the nation’s military (Chapter 6); the violations of individual liberty and freedom of speech during the Civil War crisis (Chapter 7); and broader philosophical questions about emergency and the viability of “The Rule of Law in Dark Times” (Chapter 8). Other topics might have been included, but nothing momentous has been left out. In just two hundred pages of text, Farber has covered what is of critical importance.

With one pretty major exception: slavery and *Dred Scott*. Where is the chapter on Lincoln’s constitutional views about slavery and national (and state) power to contain it? Where is the chapter on *Dred Scott*—one of the most notorious and atrocious Supreme Court decisions of all time, the key to understanding Lincoln’s rejection of complete judicial supremacy, the central theme of the Lincoln-Douglas debates and Lincoln’s unsuccessful Senate candidacy in 1858, and the issue that propelled him to national attention, the Republican nomination, and election to the presidency in 1860?

Of course, slavery and *Dred Scott* come up in Farber’s discussion, but mostly as accompaniments to other motifs, never the main theme. They are *reasons for* the secession crisis, part of the background of North-South tensions. *Dred Scott* is discussed, first, briefly, as a “disastrous miscalculation” (p 10) that exacerbated the sectional crisis leading to Civil War. Then, much later, *Dred Scott* reappears as part of the last chapter on “The Rule of Law in Dark Times” (pp 177–88), as an illustration of (and explanation for) Lincoln’s drift away from the rule of law and the obligation to follow judicial authority. (As I discuss below, for Farber, the “rule of law” is the rule of courts, leading Farber to come down, rather awkwardly—and quite misguidedly—on the side of a constitutional duty on the part of Lincoln to have adhered to and obeyed *Dred Scott*.)<sup>6</sup> Likewise, Farber treats the Emancipation Proclamation, not entirely unreasonably, as presenting an issue of presidential military power to seize enemy property, within a chapter focusing on Lincoln’s *questionable* actions with respect to “Individual Rights” (pp 152–57), not as an issue about Lincoln’s constitutional views of slavery.

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<sup>6</sup> See text accompanying notes 66–77.

Slavery and *Dred Scott* should not be the tails of any dog. For Lincoln, they were the beast itself. The Civil War was fought over the question of the constitutional status of slavery and over the constitutional power to decide that issue. Lincoln's election was a rejection of Supreme Court supremacy with respect to constitutional meaning as it concerned slavery; and secession was a rejection of the legitimacy of a President who rejected the supremacy of the Supreme Court's interpretations of the Constitution. To be sure, the dispute over slavery and *Dred Scott* provided the triggers for disputes over sovereignty, secession, and coercion—Farber's main themes—but those are mighty important triggers, deserving of examination in their own right.

Moreover, Lincoln's constitutional position on slavery was a fascinating one. According to Lincoln, the Constitution affirmatively protected the institution, as part of the bargain leading to its adoption, and it was the duty of the North to honor the bargain struck by the Fugitive Slave Clause.<sup>7</sup> In his First Inaugural, he pledged to enforce the Fugitive Slave Act. More than that, Lincoln publicly accepted as "implied constitutional law" the rather dubious proposition that the federal government lacked any power to interfere with slavery in the states choosing to have it.<sup>8</sup> Nonetheless, as President he toyed with various compensated emancipation and colonization schemes, pursuant to federal legislative power.<sup>9</sup> And, of course, ultimately, he issued the Emancipation Proclamation as an exercise of his war power as Commander-in-Chief, and later ushered in the adoption of the Thirteenth Amendment.

But before the war came, Lincoln was most closely associated with the moderate anti-slavery position that the states could permit or forbid slavery as they saw fit, but that Congress had plenary power to exclude slavery in federal territories—the latter being the very position that the Supreme Court declared unconstitutional in *Dred Scott*. The Court's decision was wrong, horribly wrong, and seemingly deliberately wrong. The Court's decision crushed Lincoln's faith in the judiciary as an impartial instrument of constitutional interpretation, and led him by degrees ultimately to a very narrow, case-specific conception of judicial authority, and to a very strongly "departmentalist" view of constitutional-interpretive power generally, under which the notion of judicial supremacy over the political branches in constitutional interpretation became tantamount, in Lincoln's eyes,

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<sup>7</sup> Lincoln, *First Inaugural Address* at 215–17 (cited in note 2).

<sup>8</sup> *Id.* at 222.

<sup>9</sup> Abraham Lincoln, *Annual Message to Congress* (Dec 1, 1862), in Fehrenbacher, ed., *Speeches and Writings, 1859–1865* 393, 403–15 (cited in note 2). For an excellent narrative account, see David Herbert Donald, *Lincoln* 343–48, 355, 362–69 (Simon & Schuster 1995).

to resignation of popular government and violation of the executive's sworn duty to preserve, protect, and defend the Constitution of the United States.<sup>10</sup> These are huge themes—with huge consequences for the other issues Farber discusses (as I will develop below). But they are, in the main, ignored in *Lincoln's Constitution*.

In addition to the slighting of slavery and *Dred Scott* (and the specific substantive issues I address below), I have two other minor quibbles with Farber's presentation. First, there are too many distracting side excursions into modern Supreme Court cases that relate only indirectly to Civil War-era themes. *U.S. Term Limits, Inc v Thornton*<sup>11</sup> (pp 27–28, 30, 33, 38, 79–80), *Alden v Maine*<sup>12</sup> (p 28), *New York v United States*<sup>13</sup> (pp 95–96), and *Printz v United States*<sup>14</sup> (p 96) are interesting recent cases, presenting important issues of federalism and sovereignty—themes at the crux of the Civil War. But the issues presented by 1990s cases involving sovereign immunity from damages suits and intergovernmental immunity are a far cry from secession and civil war. Farber's subtle attempts to tar conservative Rehnquist Court decisions with the brush of neo-Calhounism, while not utterly implausible, are a bit strained. Mostly, though, they just feel out of place—anachronistic—and detract from the narrative. Attempts to extract specific lessons for today's marginal federalism controversies from the great convulsions of interposition, nullification, secession, and civil war have their limits. Some readers, perhaps, may cheer Farber for making Civil War-era issues “come alive” for today's controversies. Others will (like me) find Civil War issues lively enough on their own, and will find Farber's modern-day morals-of-the-story dull, and forced, by comparison.<sup>15</sup>

Similarly, Farber's inclination to evaluate the constitutional propriety of Lincoln's actions through the lens of Supreme Court decisions rendered a hundred years later—as he does, for example, with issues of separation of powers and executive power, invoking the three-category paradigm of Justice Robert Jackson's concurring opinion in *Youngstown Sheet & Tube Co v Sawyer*<sup>16</sup> (pp 120, 130–32, 156),

<sup>10</sup> See Lincoln, *First Inaugural Address* at 220–21 (cited in note 2).

<sup>11</sup> 514 US 779 (1995).

<sup>12</sup> 527 US 706 (1999).

<sup>13</sup> 505 US 144 (1992).

<sup>14</sup> 521 US 898 (1997).

<sup>15</sup> Farber is explicit up front about his intention to use Lincoln-era controversies as a way of evaluating modern controversies and, conversely, to use modern doctrine to evaluate Lincoln's conduct (a point I take up presently): “In short, we can use Lincoln as a test of modern constitutional doctrine, and use modern doctrine as a medium for assessing Lincoln's actions” (p 2). Farber even says that “the book's references to modern constitutional doctrine” are “probably its most distinctive feature” (p 4).

<sup>16</sup> 343 US 579 (1952).



and with respect to the First Amendment freedom of speech in time of war, invoking *Brandenburg v Ohio*<sup>17</sup> (p 172)—feels very much like modern, court-centric anachronism. Farber acknowledges the problem of anachronism, but nonetheless seems bound by modern judicial paradigms and doctrinal tests.<sup>18</sup> For example, with respect to whether punishing anti-war speech violated the First Amendment, Farber finds this “a difficult question to answer because views of the First Amendment have changed so much over the years” (p 171), “the Supreme Court did not seriously confront First Amendment issues until about fifty years later, during World War I and its aftermath” (p 172), and the Court’s current doctrine differs markedly from those earlier cases (p 172). Farber asks (pp 172–73):

Which of these standards should we use to assess the government’s actions in the *Vallandigham* case [involving the arrest and military trial of an Ohio congressman for making a harsh anti-war speech implicitly urging draft resistance]—the relaxed standard adopted sixty years later, the tighter one of seventy-five years later, or the strict one of a century later? If the question is whether Vallandigham’s conviction should serve as a precedent today, the answer seems clear. That kind of speech regulation was decisively rejected by the Supreme Court over three decades ago, and was eroded badly several decades earlier. If the question is whether Lincoln acted in knowing violation of constitutional standards, it is hard to hold him responsible for failing to anticipate the views that the Supreme Court itself would not develop until many decades later.

If the question instead is whether Lincoln was “right” about the First Amendment in some objective sense, it is hard to know how to answer. What is the one true meaning of the First Amendment?

Am I the only one who thinks this modern, court-centric, doctrinalist approach a bit strange? It is almost like Farber is asking whether Lincoln could be held liable for damages (under current judicial doctrine of “qualified immunity”) for having violated “clearly established law [meaning, according to the judiciary, judicial decisions] of which a reasonable official should have been aware,”<sup>19</sup> rather than asking the question Farber seems so uncomfortable answering:

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<sup>17</sup> 395 US 444 (1969).

<sup>18</sup> With respect to executive power, see p 132 (“Although [Justice Jackson’s *Youngstown*] framework was articulated much later, it provides the most useful available method for analyzing executive power, even for earlier executive actions. With this framework in mind, we are finally in a position to assess the legality of Lincoln’s actions.”).

<sup>19</sup> See, for example, *Anderson v Creighton*, 483 US 635, 640 (1987).

did Lincoln's actions violate *the Constitution*, irrespective of whatever the judges may once have said, may say today, or may say in the future *about* the Constitution? Put somewhat differently, Farber's hand-wringing feels a bit like saying that the question of whether Jupiter's orbit *around Earth* was correctly calculated by a certain astronomer at a given time depends on whether one uses a Ptolemaic or a Copernican model of the solar system!

The correct answer, surely, is that the meaning of the First Amendment, and thus the propriety of Lincoln's actions, must be judged by a single standard of objective, non-time-bound, non-judicial-doctrine-contingent constitutional *meaning*—the objective meaning of the words and phrases of the text, taken in context, at the time the document was adopted.<sup>20</sup> Such a standard obviously need bear no relation to judicial doctrine at any particular time—past, present, or future. One might *excuse* Lincoln for being mistaken, on the grounds that he was a prisoner of the perceptions of his age and that he did not have the benefit of controlling judicial precedents before him or the great wisdom (?) of a century and a half of subsequent judicial precedents, but none of that answers the question whether his actions were constitutionally proper or not.

Moreover, the available evidence is that Lincoln was rarely, unless he wanted to be, a prisoner of the perceptions of his era; that he would have regarded judicial decisions on point as instructive but not necessarily controlling his conduct (the same Supreme Court being the body that had, of course, decided *Dred Scott*)<sup>21</sup>; and that he understood quite well, without the benefit of the next fifteen decades of judicial flailing about, the essential problem of whether, when, and how far it is permissible to suppress or punish speech because of its harmful tendencies. In fact, Lincoln appears to have grasped the dilemma extremely well. He did not need the Supreme Court's instruction, or anyone else's, to know the constitutional difficulty under the First Amendment presented by the arrest and detention (or banishment) of a "wily agitator"<sup>22</sup> of a Congressman for making speeches that tended, directly or indirectly, to impair military recruitment or induce desertion.<sup>23</sup>

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<sup>20</sup> For an extended defense of original-public-meaning textualism as the proper method of constitutional interpretation, see Vasani Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *Georgetown L J* 1113, 1124–33 (2003).

<sup>21</sup> See text accompanying notes 69–77 (discussing Lincoln's position with respect to the authority of judicial interpretations of the Constitution).

<sup>22</sup> Abraham Lincoln, *To Erastus Corning and Others* (June 12, 1863), in Fehrenbacher, ed., *Speeches and Writings, 1859–1865* 454, 460 (cited in note 2).

<sup>23</sup> Farber charts the Supreme Court's meandering First Amendment doctrine with respect to the problem of "incitement" from the World War I-era cases to *Brandenburg v Ohio*, 395 US 444 (1969), (pp 172–74). But Lincoln's two public letters on the issue, arising from *Ex parte Val-*

Farber's tendency to evaluate the constitutionality of Lincoln's actions in terms of modern judicial doctrines weakens somewhat the book's value as a corrective to modern constitutional law scholarship's failure to appreciate the Civil War as a great event of constitutional interpretation and reformation. That value is not lost entirely, of course, but it is diminished by the fact that Farber, for all his brilliance, is a prisoner of the perceptions of his age. And that age—

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*landigham*, 69 US 243 (1863), spotted all the issues and wrestled thoughtfully with their implications, decades and decades earlier. Lincoln notes, first, that the constitutional validity of government action affecting expression might well depend on whether the action targets speech directly or targets *conduct*, producing an incidental restriction of speech that is mixed together with such conduct (105 years before *United States v O'Brien*, 391 US 367 (1968)). He concedes that if Vallandigham's arrest was "for no other reason than words addressed to a public meeting, in criticism of the course of the Administration, and in condemnation of the Military orders of the General," that "the arrest was wrong." Lincoln, *To Corning* at 459 (cited in note 22). "But the arrest, as I understand, was made for a very different reason," to wit, that Vallandigham "was laboring, with some effect, to prevent the raising of troops" and

to encourage desertions from the army. . . . He was not arrested because he was damaging the political prospects of the Administration, or the personal interests of the Commanding General, but because he was damaging the Army . . . . He was warring upon the Military . . . . If Mr. Vallandigham was not damaging the military power of the country, then his arrest was made on mistake of fact, which I would be glad to correct on reasonably satisfactory evidence.

Id at 459–60.

Lincoln continues by defending the less-harsh consequence of the arrest, when compared with alternative approaches and their attendant harms (over fifty years before Learned Hand's *Masses* opinion employed a similar calculus, *Masses Publishing Co v Patten*, 244 F 535 (SD NY 1917), and before the various "clear and present danger" formulations and applications of the Supreme Court over the next five decades). Lincoln wrote: "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? . . . I think that in such a case to silence the agitator, and save the boy is not only constitutional, but withal a great mercy." Lincoln, *To Corning* at 460. Lincoln also seems to know that these arguments are not entirely satisfying, and he concludes with an argument that his type of constitutional error is better than the alternative type of error:

If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or invasion, the public safety requires them, which would not be constitutional when, in the absence of rebellion or invasion, the public safety does *not* require them: in other words, that the Constitution is not, in its application, in all respects the same, in cases of rebellion or invasion involving the public safety, as it is in time of profound peace and public security.

Id. This resembles a "compelling state interest" justification for what *otherwise would be* a First Amendment violation. One may well disagree with Lincoln's application of these principles in the particular case of Vallandigham, or with his assessment of the degree to which necessity required the actions taken. But he appears to have understood the nature of the constitutional problem—and, indeed, formulated his justification in terms similar to those which later judicial doctrine adopted (and the application of which by those courts is fully as debatable). Lincoln believed that some constitutional actor must make the ultimate judgment of the degree of necessity, and that in time of war, that ultimate judgment must rest with "the man whom, for the time, the people have, under the constitution, made the commander-in-chief, of their Army and Navy . . ." Abraham Lincoln, *Reply to the Ohio Democratic Convention* (June 29, 1863), in Fehrenbacher, ed, *Speeches and Writings, 1859–1865* 465, 467 (cited in note 2).

ours—tends to view all questions of constitutionality through the prism of judicial development of doctrine.

My second quarrel with Farber's overall presentation is that there is simply not enough Lincoln in *Lincoln's Constitution*. For a book entitled *Lincoln's Constitution* and featuring, on the dust jacket cover, a huge, bracing close-up of Lincoln's face staring the reader straight in the eye, Farber has set forth and discussed remarkably little of Lincoln's actual constitutional analysis. Instead, Farber's narrative with respect to the issues of Lincoln's day draws on Madison, Hamilton, Calhoun, Marshall, and others. The book is rich in such historical constitutional analysis, and the committed constitutional historian will find it fascinating. But it is striking how little of the analysis is *Lincoln's*.

This is not because there is little such material. On the contrary, Lincoln's speeches and writings contain perhaps the most serious, systematic, and lucid discussions of vital constitutional issues of any President in our nation's history (with the possible exception of Madison, though most of his great constitutional work was not during his years as President).<sup>24</sup> That is part of what makes Lincoln such a compelling example of presidential constitutional interpretation. One hates to make a this-is-not-the-book-I-would-have-written point, but a great narrative about "Lincoln's Constitution" could have been built entirely on Lincoln's writings.<sup>25</sup> Not all readers will agree, but I would like to have seen a bit more of Lincoln and a bit less of everybody else.

Does this get reflected in how Farber treats the issues? Is his treatment less Lincolnesque than it otherwise might be, were the focus more on Lincoln's actual analysis of each problem? I think so, at least in emphasis and at times in conclusion. It is the burden of the remainder of this Review to show how this may be so, with respect to three great questions: the constitutionality of secession; the authoritativeness and binding character of Supreme Court interpretations of the Constitution; and the scope of presidential power to take action to preserve, protect, and defend the nation in time of crisis.

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<sup>24</sup> Indeed, Farber acknowledges that Madison's views, as much as or more than Lincoln's, are the focus of nearly half the book: "if the first half of the book has a hero, that hero is as much James Madison as Abraham Lincoln. Among antebellum thinkers, it was Madison who provided the most cogent constitutional vision of the Union" (p 4).

<sup>25</sup> I may be prejudiced in this regard by having recently read Edmund S. Morgan's outstanding short biography of Benjamin Franklin. Morgan's preface candidly states that his biography is "the result of reading everything on the disk [containing all of Franklin's writings] and in the volumes but not much else . . ." Edmund S. Morgan, *Benjamin Franklin* xi (Yale 2002).

### III. “[N]O STATE, UPON ITS OWN MERE MOTION . . .”

The Civil War resolved an intensely theoretical constitutional issue—where does “sovereignty” reside under the Constitution, in the national government or in the states?—in an intensely practical way: by force of arms. But if one were to “read” that resolution as if it were a judicial opinion, how would one describe the “holding” of the case? The correct answer, probably, is that the Civil War holds that individual states are not sovereign in the sense that any of them, acting singly or together, has a constitutional right to secede from the Union *that the nation as a whole is constitutionally obliged to honor*; nor are the states, as states, acting singly or together, the final and exclusive judges, for themselves, of the meaning of the Constitution. As Lincoln put it in his First Inaugural:

[N]o State, upon its own mere motion, can lawfully get out of the Union,—that *resolves* and *ordinances* to that effect are legally void; and that acts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary, according to circumstances.<sup>26</sup>

Lincoln won his case, finally, at the Appomattox Court House in 1865. But was Lincoln’s view right as a matter of first principles of the Constitution?

In a word, *Yes*. But it is important to attend to what Lincoln does *not* say as well as to what he does. Lincoln argues only that individual states are *not sovereign* in the sense of being able to do as they please; and that they are *not supreme* over the national government in the sense of each state, for itself, or a group of states acting together, being the ultimate judge of whether the national government has committed a material breach of the Constitution.<sup>27</sup> But nowhere does Lincoln argue that states may not properly interpret the Constitution at all—that the views of the national government automatically resolve any point of constitutional controversy. Still less does Lincoln argue—how could he, given his stance on *Dred Scott*?—that all power of constitutional interpretation is vested in the *judicial* branch of the federal government, thereby excluding any right of states to judge whether the Constitution has been violated by the national government. Indeed, he pointedly disavows such a position, late in the First Inaugural.<sup>28</sup> Rather, Lincoln argues simply that the Constitution *has*

<sup>26</sup> Lincoln, *First Inaugural Address* at 218 (cited in note 2).

<sup>27</sup> The latter was John Calhoun’s argument, subject to the qualification that an individual state’s interpretation could be overruled by a decision of three-fourths of the other states. More on Calhoun presently (see text accompanying notes 45–49).

<sup>28</sup> Lincoln, *First Inaugural Address* at 220–21 (cited in note 2) (asserting that “the people will have ceased, to be their own rulers” if constitutional questions are “irrevocably fixed by deci-

not been and will not be violated by his administration and his policies—that the South has no just constitutional cause to secede, on any fair reading of the document. Lincoln appears to concede that if the federal government had deprived the South “of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would, if such right were a vital one.”<sup>29</sup>

This is not Professor Farber’s position. Instead, the position that Farber defends is the position of the elder statesman James Madison in 1828–1832 (in quite serious tension with, if not outright contradiction of, the position of the younger Madison of *The Federalist* (1787–1788) and of the Virginia Resolutions (1799–1800)).<sup>30</sup> It is also the position of Daniel Webster and Joseph Story from the same anti-nullification era (other important sources for Farber’s analysis).<sup>31</sup> It is the position of the Northern states opposing the Virginia and Kentucky Resolutions in 1799.<sup>32</sup> And it is the position of the modern Supreme Court: federal judicial supremacy. But federal judicial supremacy was not at all *Lincoln’s* argument against the constitutional propriety of secession.

Lincoln’s argument against secession stands on its own terms. It is set forth most fully in his First Inaugural Address of March 4, 1861 and in his Special Message to Congress of July 4, 1861. The First Inaugural is a carefully constructed legal argument; it almost reads like a brief, written by a lawyer accustomed to making logical arguments rather than by a politician accustomed to rhetorical flourishes. Lincoln starts by contesting any claim that the federal government has violated or intends to violate the Constitution: “Apprehension seems to exist among the people of the Southern States,” Lincoln says, that his election poses a threat to their “property” (an important choice of words), their peace, and their personal security.<sup>33</sup> “There has never been any reasonable cause for such apprehension,” he contends, and proceeds to develop what feels like “Point I” of the brief: as President, he will—he *must*, because of his oath—enforce all provisions of the Constitution. He will not interfere with slavery in any state.<sup>34</sup> (A

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sions of the Supreme Court”). I discuss at greater length below Lincoln’s rejection of the idea of judicial supremacy. See text accompanying notes 69–77.

<sup>29</sup> Lincoln, *First Inaugural Address* at 219 (cited in note 2).

<sup>30</sup> For Madison’s (inconsistent) views, see note 49.

<sup>31</sup> On Webster, see pp 57–59. On Story, see pp 52–53. See also Joseph Story, 1 *Commentaries on the Constitution of the United States* §§ 306–96 at 279–381 (Da Capo reprint 1970) (originally published in 1833).

<sup>32</sup> See Jonathan Elliot, ed., 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 532–39 (Lippincott 2d ed 1863) (listing the answers of Delaware, Rhode Island, Massachusetts, New York, Connecticut, New Hampshire, and Vermont to the Virginia and Kentucky Resolutions of 1798 and 1799).

<sup>33</sup> Lincoln, *First Inaugural Address* at 215 (cited in note 2).

<sup>34</sup> *Id.* (disclaiming any “purpose, directly or indirectly, to interfere with the institution of

bit later Lincoln says that he understands the right of a state to its own “domestic institutions” to “now be implied constitutional law,” which he would not object to “being made express, and irrevocable” by way of formal constitutional amendment.)<sup>35</sup> He will enforce the obligations of the Fugitive Slave Clause of the Constitution, because it is part of the Constitution he has sworn to uphold, and the Fugitive Slave Act of Congress implementing it.<sup>36</sup> While there are small points of disagreement as to the precise meaning of the Fugitive Slave Clause, Lincoln declares that he takes “the official oath to-day, with no mental reservations, and with no purpose to construe the Constitution or laws, by any hypercritical rules.”<sup>37</sup> The South has no cause for alarm, and no reason to assume that he will deprive any state of its claimed rights under the Constitution, including protection of the institution of slavery in the states that choose it.

The next section of the Inaugural develops “Point II” of Lincoln’s brief: no state has a unilateral constitutional right to secede, at its sole option, that the Union as a whole is constitutionally obliged to recognize and grant. Lincoln argues that “*in contemplation of universal law, and of the Constitution, the Union of these States is perpetual.*”<sup>38</sup> Perpetuity is “implied, if not expressed, in the fundamental law of all national governments”; the Constitution does not provide a right of withdrawal in terms; such a right is in the nature of things contrary to the creation of a government whose perpetuity is implied; it is contrary to the nature of the specific government created by the Constitution, which is a government proper and not a mere league; a unilateral right of secession is not supported even on the theory that the United States is a mere association of states in the nature of a compact; and secession is at odds with the language of the Constitution itself, which announces at the outset the goal of providing “a more perfect union” even than the “perpetual” one contemplated by the Articles of Confederation.<sup>39</sup> The argument—a combination of postulates about the nature of governments, specific references to the Constitution’s text, and arguments from constitutional structure—takes Lincoln all of four paragraphs. From all this, Lincoln draws the conclusion that no state may lawfully secede “upon its own mere motion.”<sup>40</sup>

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slavery in the States where it exists”).

<sup>35</sup> Id at 222.

<sup>36</sup> Id at 216–17.

<sup>37</sup> Id at 217.

<sup>38</sup> Id (emphasis added).

<sup>39</sup> Id at 217–18.

<sup>40</sup> Id at 218.

The next section of the Inaugural (“Point III”) sets forth the legal consequences of this conclusion for presidential action, in what becomes the legal theory under which Lincoln fights the Civil War:<sup>41</sup>

I therefore consider that, in view of the Constitution and the laws, the Union is unbroken; and, to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. Doing this I deem *to be only a simple duty on my part; and I shall perform it*, so far as practicable, unless my rightful masters, the American people, shall withhold the requisite means, or, in some authoritative manner, direct the contrary.<sup>42</sup>

It is worth pausing at this point to consider this passage and its implications for Professor Farber’s chapter on “The Legitimacy of Coercion” (pp 92–114). Farber insists that we “take seriously the claim that even if secession was unconstitutional, the North should have acquiesced” (p 93). Farber is right; the question is serious: was preserving the Union, through force, really worth the lives of six hundred thousand men (if one had known the cost in advance)? Farber’s discussion is fascinating, especially concerning the Buchanan administration’s legal opinion that, while secession was unconstitutional, the federal government could not “make war” against a state and thus was powerless to prevent secession. Lincoln’s rebuttal, in this section of the Inaugural, consistent with his legal theory of the Civil War generally, was that this was not “making war” against another sovereign, for secession was not legally possible and the Confederacy did not exist as a legal entity. Rather, this was suppressing an unlawful rebellion and executing the laws of the United States in all of the states to the full extent possible.<sup>43</sup>

But Farber misses an essential point here (to which I return below): Lincoln fought the Civil War out of a sense of *constitutional duty*, flowing from his oath of office to “preserve, protect and defend” the Constitution and his sworn duty to take care that the laws be faithfully executed. Given his conclusion that secession was constitutionally invalid, Lincoln felt he had no other choice. On this point, Lincoln was what we today would call a constitutional “formalist.” He believed it *not open to him* to acquiesce to secession. He was bound by his oath to enforce the laws, in accordance with his understanding of the Constitution’s design for a perpetual Union: “*You have no*

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<sup>41</sup> For development of this point about Lincoln’s constitutional theory of the Civil War, see Vasani Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 Cal L Rev 291, 302–13 (2002).

<sup>42</sup> Lincoln, *First Inaugural Address* at 218 (cited in note 2) (emphasis added).

<sup>43</sup> *Id.* at 218–19.



oath registered in Heaven to destroy the government,” he said to the South in the penultimate paragraph of the Inaugural, “while *I* shall have the most solemn one to ‘preserve, protect and defend’ it.”<sup>44</sup> Absent such a sworn duty, it *is* hard to justify the North’s fighting so terrible a war simply to keep in those who wanted out. Fighting for a constitutional theory of Union—the North did not fight, at least not initially, a war against slavery—is hard to defend on purely pragmatic policy grounds, unless one has a sense of constitutional and moral duty backing it.

To return to Lincoln’s argument for the indissolubility of the Union: the First Inaugural does not directly engage the elaborate theoretical constructs of John Calhoun and others concerning state sovereignty. Perhaps Lincoln refrained from challenging “state sovereignty” in order not to offend the states of the Upper South that had not seceded, where the notion had some currency. But in his July 4, 1861 Special Message to Congress—after the Upper South had defected—Lincoln let loose, attacking at length the “sophism” that “there is some omnipotent, and sacred supremacy, pertaining to a *State*—to each State of our Federal Union.”<sup>45</sup> Lincoln effectively demolishes Calhoun’s intricate, difficult, contrived theories with a few quick blows: the term “sovereignty” is not even in the Constitution; none of the states (except Texas) was ever sovereign *outside* the Union; and, indeed, “the Union gave each of them, whatever of independence, and liberty, it has.”<sup>46</sup> Moreover, Lincoln adds, by the same logic according to which one or a few states could secede from the others, all the other states could drive a single state out of the Union, by collectively “seceding” from it—a position surely anathema to “state’s rights” politicians.<sup>47</sup>

Farber’s book is at its best in disentangling the convoluted strands of Calhounian and neo-Calhounian Southern theories of state sovereignty and secession (pp 57–91).<sup>48</sup> Farber’s analysis (quite unlike Calhoun’s) is lucid and enlightening. Calhoun’s specific the-

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<sup>44</sup> Id at 224.

<sup>45</sup> Lincoln, *Message to Congress in Special Session* at 255 (cited in note 5).

<sup>46</sup> Id at 255–56.

<sup>47</sup> Id at 258 (“[T]he whole class of seceder politicians would at once deny the power, and denounce the act as the greatest outrage upon State rights.”).

<sup>48</sup> Again, however, Farber does this work without much help from Lincoln. The arguments he makes come from Alexander Hamilton (pp 63, 96–98), John Marshall (pp 50–57), Daniel Webster (pp 57–58), Andrew Jackson (pp 61–62), Joseph Story (pp 52–53), and especially the elder statesman James Madison (pp 62–69, 83, 85–91). Even Lincoln’s hapless predecessor, James Buchanan, gets some attention (pp 75–76, 83). The arguments made in Lincoln’s Inaugural take up, curiously, less than a page of Farber’s analysis on this point (pp 78–79), yet they are wonderfully clear and succinct. Farber appears to regard Lincoln’s views as essentially a rehash of these earlier ones, but as I will discuss presently, there is at least one important difference. See text accompanying note 63.

ory—that a decision of a state denying the existence of a national governmental power should have the effect of nullifying the act of national power unless the state's decision is *reversed* by three-fourths of the states (the number of states needed to ratify a constitutional amendment) is, as Farber (building on Madison) makes clear, quite illogical, almost contrived. The theory would in effect permit a single state to amend the Constitution or dictate an idiosyncratic controlling interpretation of its provisions, unless three-fourths of the states *rejected* such a view (p 68). This theory turns the three-fourths-of-the-states ratification requirement of Article V on its head. One is left with the same feeling Madison expressed in 1830—that it would be hard to take such a theory of state sovereignty seriously were it not associated with such “distinguished names and high authorities.”<sup>49</sup>

But refuting a bad theory does not prove its opposite. To be sure, the Southern arguments for interposition, nullification, and secession, from the 1790s to the 1860s, frequently relied on theories of state *sovereignty* or interpretive *supremacy*.<sup>50</sup> But it is not clear why such a

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<sup>49</sup> James Madison, *To Edward Everett* (Aug 1830), in 4 *Letters and Other Writings of James Madison* 95, 102 (Lippincott 1865). But alas, the “distinguished names and high authorities” that could plausibly and responsibly be invoked in behalf of a state power of “nullification” include James Madison himself, and even more so Thomas Jefferson, in their primary authorship of the Virginia and Kentucky Resolutions of 1798 and 1799, and in Madison’s defense of the Virginia Resolutions in the Report of 1800. Madison’s 1830 letter to Everett, on which Farber relies heavily, is simply irreconcilable with the Report of 1800 in vital respects. The Report of 1800 emphatically denied federal judicial supremacy over the States; the Everett letter of 1830 embraced judicial supremacy as *the* sufficient answer to nullification advocates. See James Madison, *Madison’s Report on the Virginia Resolutions (Report of 1800)*, in Elliot, ed, 4 *Debates* 546, 549 (cited in note 32):

However true, therefore, it may be, that the judicial department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government; not in relation to the rights of the parties to the constitutional compact, from which the judicial, as well as the other departments, hold their delegated trusts.

Contrast Madison, *To Everett* at 100–01 (warning opponents of federal judicial supremacy that “a supremacy of law in the land” requires “a supremacy in the exposition and execution of the law”). The Virginia Resolutions and the Report of 1800 maintain that the interposition of the states in resistance to allegedly unconstitutional acts of the national government is a matter of constitutional duty. James Madison, *Virginia Resolutions of 1798*, in Elliot, ed, 4 *Debates* 528, 528 (asserting of the General Assembly of Virginia that “it is their duty to watch over and oppose every infraction of those principles which constitute the only basis of that union”). See also *id* at 529 (“[I]t would mark a reproachful inconsistency and criminal degeneracy, if an indifference were now shown to the most palpable violation of one of the rights thus declared and secured.”); Madison, *Report of 1800* at 546 (reaffirming and defending the states’ duty to oppose and resist infractions of the U.S. Constitution). The Everett letter of 1830 regarded such interpositions as entailing the “destruction of all equipoise between the Federal Government and the State governments” and being “fatal to the constituted relation between the two Governments.” Madison, *To Everett* at 101.

<sup>50</sup> This was the form in which the argument was made, not only by Calhoun, but also (arguably) by Madison and (certainly) by Jefferson in the Virginia and Kentucky Resolutions, respectively. See Madison, *Virginia Resolutions* at 528–29 (cited in note 49); Thomas Jefferson, *Ken-*

sweeping theory would have been thought necessary to the claimed right of a state to resist alleged unconstitutional action by the national government. Why would it not be sufficient justification for state resistance (in theory at least, and leaving open the question of what *form* such resistance properly could take) that the federal government had committed a very serious breach of the Constitution, at the expense of the states or the rights of the people generally, with no reasonable prospect for remedy at the federal level in the ordinary course of business? Shorn of some of Jefferson's more reckless views, and Madison's uncharacteristically careless language, this was, after all, the theory of the Kentucky and Virginia Resolutions challenging, and proposing concerted resistance to, the Alien and Sedition Acts. So modified, what, exactly, is wrong with the theory?

Consider some hypothetical examples. Imagine, for instance, that the national government deprived a state of all representation in Congress, in plain violation of the Constitution. Might not the affected state be justified, at least in theory, in declaring that a material breach of the Constitution had occurred? And if no other remedy were available, over a long train of years, might not such a breach justify the extreme remedy of secession? Or imagine that the national government, sustained by the federal courts, had made it a crime to speak or publish harsh denunciations of the federal government—the true-life situation that provoked the Virginia and Kentucky Resolutions. Might not the states, as Madison and Jefferson urged, properly interpose state power to frustrate, and if possible reverse, the national government's violation of the Constitution, through every available means? Or imagine a “Second *Dred Scott*” decision—a specter raised by U.S. Senate candidate Lincoln in 1858<sup>51</sup>—requiring free states to recognize and permit slavery within their borders, as a matter of federal constitutional law. Might not a state justifiably refuse to accede to such an outrage on its right to *exclude* slavery, notwithstanding the Supreme Court's (lawless) decision to the contrary?<sup>52</sup> Might not the form of such resistance include de facto “nullification” of the decision through the interposition of state power against it? In the absence of all other remedies, might not a state be justified—even *constitutionally* justified—in *seceding*, over a matter of vital constitutional (and moral) principle, rather than acquiescing in a violation of the Consti-

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tucky Resolutions of 1798 and 1799, in Elliot, ed, 4 *Debates* 540, 540–45 (cited in note 32).

<sup>51</sup> Abraham Lincoln, *First Lincoln-Douglas Debate, Mr. Lincoln's Reply* (Aug 21, 1858), in Don E. Fehrenbacher, ed. *Abraham Lincoln: Speeches and Writings, 1832–1858* 508, 524, 527 (Library of America 1989) (concluding that all that “is necessary for the nationalization of slavery” is “the next *Dred Scott* decision”).

<sup>52</sup> I have suggested this possibility, in response to a similar hypothetical, elsewhere. Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 Albany L. Rev. 671, 684–85 (1995).

tution, affecting the rights of the people of the state, and making the state complicit in the violation and the resulting human oppression?

Answering some or all of these questions in the affirmative does not require a theory of state interpretive *supremacy*. It merely requires a theory of state interpretive *legitimacy*, and denial of any premise of *federal* interpretive supremacy.

The affirmative case for a legitimate constitutional power of state governments independently to interpret the U.S. Constitution, and to resist perceived federal government violations of it, is not unproblematic, as Farber ably demonstrates (pp 66–69). Such a practice might well generate more disuniformity in constitutional interpretation; sometimes, but not always, such disuniformity itself would violate the Constitution (like South Carolina’s attempted nullification of the tariff);<sup>53</sup> and some such interpretations would simply be *wrong*, and a part ought not be permitted to impair the Constitution of the whole. There are good, if imperfect, answers to these objections: non-uniform interpretation exists elsewhere in our constitutional order, and a certain amount of it is tolerable. Indeed, disuniformity may be preferable to a *uniformly wrong* interpretation, with no chance of reversal, and there is evidence that the framers contemplated state governments operating as checks on the national government in this regard.<sup>54</sup> Moreover, the possibility of erroneous constitutional interpretations is not a problem unique to state interpretation. It exists wherever interpretive power exists, and exists without the possibility of a check or corrective if interpretive supremacy is vested in a particular body.

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<sup>53</sup> For a tariff to operate in some states but not others would appear to violate the constitutional requirement that “all Duties, Imposts and Excises shall be uniform throughout the United States.” US Const Art I, § 8, cl 1.

<sup>54</sup> See, for example, Federalist 28 (Hamilton), in *The Federalist* 176, 179–80 (Wesleyan 1961) (Jacob E. Cooke, ed):

Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress.

See also Federalist 33 (Hamilton), in *The Federalist* 203, 207:

But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers but which are invasions of the residuary authorities of the smaller societies will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such.

See also Federalist 44 (Madison), in *The Federalist* 299, 305 (allowing that “in the last resort” the people of the states may, by “election of more faithful representatives, annul the acts of the usurpers”); Federalist 51 (Madison), in *The Federalist* 347, 351 (“Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.”).

The affirmative case for state government interpretive competence (but not supremacy) is surprisingly straightforward, finding support in the text, structure, history, and early interpretations of the Constitution. The text designates “this Constitution”—the document itself—as the supreme law of the land, and not the interpretations of any specific actor or body.<sup>55</sup> The oath to abide by the Constitution, relied on in *Marbury v Madison*<sup>56</sup> to support the argument for an independent judicial power of constitutional interpretation, applies to state and federal officials alike. The structure of the Constitution, while not making states supreme over the national government, *does* leave them structurally independent of the organs of national government; they are not subordinate agencies or administrative districts of the national government. And, as noted, prominent framers seem to have regarded state governments as important checks on unconstitutional usurpations of power by the national government.<sup>57</sup> The argument for independent state interpretive power is supported by numerous passages in *The Federalist*; by the well-reasoned arguments set forth by Madison and Jefferson, respectively, in the Virginia and Kentucky Resolutions of 1798 and 1799 against the Alien and Sedition Acts; and by Madison’s Report of 1800 defending those Resolutions. It is even supported, indirectly, by the reasoning and logic of *Marbury v Madison*.<sup>58</sup> Indeed, the Civil War’s “holding” against the South can, in a sense, be seen as a case-specific resolution of the constitutional question of whether a state may secede *by the precise mode of resolution the framers anticipated*: by the relative weight of arms and sentiment of the people.<sup>59</sup>

Lincoln did not definitively address the question of the existence or proper scope of a state’s power to interpret the Constitution, other than to deny that individual states are sovereign. Their views do not *control* the actions of the national government; the part may not dic-

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<sup>55</sup> The argument that the Constitution designates the Supreme Court, by implication, as the single authoritative interpreter of the Constitution is hard to square with the most natural reading of the Constitution’s text, structure, and history. For an extended argument in this regard, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L J 217 (1994) (arguing for executive branch interpretive authority). See also Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 Mich L Rev 2706 (2003); Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency after Twenty-Five Years*, 83 Minn L Rev 1337, 1349–59 (1999) (arguing, and collecting evidence in support of the proposition, that “[j]udicial supremacy is simply not an originalist position” and “is consistent with none of the evidence we have of the original meaning of the Constitution”).

<sup>56</sup> 5 US (1 Cranch) 137 (1803).

<sup>57</sup> See note 54.

<sup>58</sup> I have sketched the overall argument, and gathered the surprisingly supportive passages from *The Federalist* in Paulsen, 101 Mich L Rev 2706 (cited in note 55).

<sup>59</sup> Federalist 28 (Hamilton), in *The Federalist* 176, 176–78 (cited in note 54) (appearing to suggest that the people may make use of the state to organize armed forces to resist usurpations of the national government).

tate to the whole. Lincoln preferred to argue that, on any fair reading of the Constitution, there had been no material breach justifying the extreme measure of secession. But he appeared prepared to concede, at least for the sake of argument, the existence of a potential remedy of secession for a very serious breach of the Constitution by the organs of the national government (though it is unclear whether Lincoln would have regarded it as a constitutional or extra-constitutional remedy):

All profess to be content in the Union, if all constitutional rights can be maintained. Is it true, then, that any right, plainly written in the Constitution, has been denied? I think not. . . . Think, if you can, of a single instance in which a plainly written provision of the Constitution has ever been denied. If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would, if such right were a vital one. But such is not our case.<sup>60</sup>

*But such is not our case.* Recall that “Point I” of the Inaugural had been devoted to reassuring the South of Lincoln’s commitment to non-interference with slavery in the states and full enforcement of the Fugitive Slave Clause. Lincoln would not, he emphasized, act in any way contrary to the Constitution, whatever his personal views concerning slavery.

Significantly, however, Lincoln did not pledge to act in accordance with the Supreme Court’s *interpretations* of the Constitution—like *Dred Scott*’s denial to the federal government of the power to prohibit slavery in the territories. Indeed, it is at this point in the Inaugural that Lincoln addresses the proposition that it is the Supreme Court, exclusively and finally, that decides matters of constitutional interpretation:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the

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<sup>60</sup> Lincoln, *First Inaugural Address* at 219 (cited in note 2).

candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.<sup>61</sup>

Lincoln's stance is carefully hedged with ambiguity. The Court's decisions do bind parties (but what if the government were a party?). It is better, as a rule (but not always?), to abide by an erroneous outcome in the particular case but seek to have it overruled. But the bottom line is clear: the Supreme Court's decisions cannot be regarded as final and binding on the political choices and life of the nation without the people resigning their government into the hands of "that eminent tribunal" that decided *Dred Scott*.<sup>62</sup>

There are two points here. First, Lincoln's argument against the constitutional validity of secession does not—cannot—depend, as the arguments of the authorities collected and embraced by Farber do, on the proposition of federal judicial exclusivity and supremacy in constitutional interpretation. Quite the contrary, as noted, Lincoln's argument assumes the position that a very serious breach of the Constitution by the national government *would* provide just cause for state resistance.<sup>63</sup>

Second, at the same time that Lincoln appears to concede the theoretical legitimacy of secession for grave constitutional breaches, he consistently maintains the position that his own and his party's pledged resistance to the Court's decision in *Dred Scott* as a rule governing his administration's actions *is not such a breach*. He does not retreat one inch from his stance, most fully developed in his debates with Stephen Douglas in the Senate campaign of 1858, that *Dred Scott* is wrong and cannot be regarded as binding the actions of po-

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<sup>61</sup> Id at 220–21.

<sup>62</sup> Some have found Lincoln's remarks a softening, or retreat, from views he had expressed more stridently as a Senate candidate. Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* 341–43 (Rowman and Littlefield 2000) ("The paragraph in the inaugural on *Dred Scott* . . . is as little contentious as Lincoln can make it."). Indeed, what Lincoln had portrayed, in his Senate campaign debates with Douglas, as a conspiracy involving Chief Justice Taney, the Supreme Court, and Democratic politicians, became in the Inaugural the decisions of an "eminent tribunal" in performance of a duty "from which they may not shrink"; and it is not their fault "if others seek to turn their decisions to political purposes." Lincoln, *First Inaugural Address* at 221 (cited in note 2).

<sup>63</sup> Lincoln does not specify whether such resistance is *constitutionally* justified or simply *morally* justified but of a revolutionary nature; and he urges restraint in such resistance, while there is any hope of a remedy within the existing constitutional framework. Lincoln, *First Inaugural Address* at 219 (cited in note 2) ("Will you hazard so desperate a step, while there is any possibility that any portion of the ills you fly from, have no real existence?").

litical officials. Lincoln's argument against the constitutional validity of secession thus depends as well on the constitutional propriety of his view that the Supreme Court's decisions are not final and binding as a rule governing official conduct (including his own), outside of the specific case where rendered.

Lincoln's position bothered more than a few folks in the South, who saw in it confirmation of their worst fears: the Lincoln administration stood for deliberate violation of what the Southern states regarded as their constitutional rights.<sup>64</sup> Such a view of Lincoln was, indeed, reasonable—if the South was entitled to assume that the Supreme Court's interpretations of the Constitution were controlling law, binding elected officials. If a President's refusal to be bound, prospectively, by the Supreme Court's interpretations of the Constitution is *itself* a serious breach of the Constitution, the South would, by Lincoln's own logic, have just cause to complain. The position is best expressed in a congressional speech by Senator Nicholson of Tennessee, between Lincoln's election and his inauguration, which is fairly representative of the views of other Southern politicians at the time as well.<sup>65</sup>

This party [the Republican party] promises us, as the inducement to our repose, that our rights of property in slaves shall not be interfered with in the States, *because* the Constitution recognizes those rights. But they refuse to extend that promise to our rights of property in slaves outside of the States, although, upon the authority of *the high judicial tribunal of the country for deciding constitutional questions*, we have exactly the same rights outside of the States, within the jurisdiction of the Federal Government, as the owners of any other species of property have. They concede our rights in the one case, because they are expressly recognized by the Constitution; they deny them in the other, and in so doing, *repudiate the authoritative adjudication of the Supreme Court*.

...

It was to secure repose that the South sought for years, and with earnestness, to secure the recognition of congressional non-intervention as the established policy of the country. *Although this principle has been declared by the Supreme Court to be the true intent and meaning of the Constitution*, we have failed to se-

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<sup>64</sup> For an account of Southern newspaper reactions, see Donald, *Lincoln* at 284 (cited in note 9).

<sup>65</sup> For an excellent sampling, see Jaffa, *A New Birth of Freedom* at 203–36 (cited in note 62) (discussing speeches and writings of Jefferson Davis and Alexander Stephens).



cure repose, because the Republican party repudiated that solemn adjudication, and resolved to continue the agitation of the question until its reversal could be secured.<sup>66</sup>

Professor Farber's position is the same as Senator Nicholson's: elected officials must regard the Supreme Court's interpretations of the Constitution as binding, even if they regard those decisions as wrong. As discussed in the next Part of this Review, this places Farber decidedly at odds with Lincoln's position on judicial authority. Just as fundamentally, however, it also puts Farber at odds with Lincoln's argument against the validity of secession. For if Farber is right about federal judicial supremacy, Lincoln's stance against *Dred Scott* was wrong, and the South was legitimately within its rights to secede in response to Lincoln's pledged gross violation of fundamental constitutional principles. Indeed, Farber says almost exactly that: "If Lincoln meant to ignore all judicial interpretations in carrying out his law enforcement duties as president, the South would have had a valid complaint, because Lincoln would be systematically violating the legal rights of individual Southerners" (p 187). Thus, Farber's judicial supremacist view ironically undermines his argument against secession: states may not secede, because the Supreme Court, not state governments, gets the last word on constitutional interpretation. But if the Supreme Court gets the last word, the South was right to regard Lincoln's election as an assault on the South's constitutional rights.

So who is right about judicial supremacy: Professor Farber or President Lincoln?

#### IV. "[T]HAT EMINENT TRIBUNAL"

It would be an exaggeration to claim that the Civil War repudiated the notion that the Supreme Court's constitutional pronouncements are binding on all other actors in our constitutional system, but not by very much. Lincoln campaigned against the binding nature of *Dred Scott*, other than as a rule of decision for the parties in that particular case. He campaigned against popular acquiescence in a potential "Second *Dred Scott*" opinion that might confirm and extend the

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<sup>66</sup> Cong Globe, 36th Cong, 2d Sess 187 (Dec 24, 1860) (remarks of Senator Nicholson) (emphasis added). A week later, Senator Judah Benjamin made a similar argument for the constitutional propriety of secession based on the North's asserted violations of the Constitution. Cong Globe, 36th Cong, 2d Sess 212-17 (Dec 31, 1860) (asking "who is to judge" when the "compact has been broken," noting that the Constitution "has provided for a supreme judiciary to determine cases arising in law or equity which may involve the construction of the Constitution," and arguing that in cases "not susceptible of judicial decision" impairing political rights of the states, the states must be permitted to exercise a constitutional right of "self-defense" against unconstitutional actions of the national government).

original, and introduce a requirement that Northern states tolerate slavery within their borders. In a very real sense, Lincoln's election constituted an electoral rejection of the Supreme Court's supremacy in matters of constitutional law. The South's attempted secession was a rejection of the validity of that electoral rejection and of the constitutional views of the North more generally. Lincoln's rejection of secession, in turn, rejected the legitimacy of the South's constitutional objections. And so the issue was joined, and would be determined on the battlefield.

Putting the guns to one side, whose view was right? The Civil War's resolution of this question has *not* had the staying power of its holding against secession. Appomattox settled for all time the question of the constitutional validity of secession, against the position of the South. But Appomattox's implicit holding for Lincoln's position on the supremacy of the Supreme Court's interpretations of the Constitution has been overturned by subsequent history. The conventional view today, the dominant view in legal academia (and of course the view held by the courts themselves), is that of Senator Nicholson and Professor Farber.

Farber offers three arguments for judicial supremacy, all of which end up endorsing *Dred Scott* as controlling law, binding on the executive (though Farber is obviously quite uncomfortable with this specific result). First, Farber defends judicial supremacy on the ground that "[s]ome authoritative method is needed to resolve disputes about the meaning of the Constitution" (p 183). At first blush, this sounds eminently sensible. Who could question the need to resolve disputes, and the logic of giving courts this role? But on inspection, the argument proves to be deeply superficial—surely one of the great unexamined legal premises of our time. Of course, "one of the key functions of courts is to provide a peaceful, orderly method of resolving disputes" (p 183), but what if the courts' resolution is *dead wrong*—indeed, so wrong and disruptive that it is destructive of the peaceful dispute-resolution function asserted to justify judicial finality in the first place? And what about checks and balances? Does not our Constitution deliberately prefer division, tension, uncertainty, and dynamic equilibrium over "authoritative" resolution? Is not fear of *wrong* or *harmful* authoritative political acts precisely what the Constitution's separation of powers is all about? Is not *Dred Scott* Exhibit A in the case against judicial supremacy?

Farber's second argument is even weaker: judicial supremacy is justified by "the unique strength of courts as interpreters of the Constitution" (p 183). This is because "the judicial process is uniquely designed as a forum of principle rather than politics, with its presentation of opposing arguments, its deliberative qualities, and its mandate

for reasoned explanation of decisions” (p 183). Well, now. Sometimes yes, sometimes emphatically no, but certainly not *invariably* is this the case. Again, what of *Dred Scott*? Is this not the definitive example of judicial willfulness run amok? Of judicial politics rather than principle? Of “reasoned explanation” that cannot be taken seriously as competent, faithful interpretation of the Constitution? If the response is that *Dred Scott* was an aberration, the point is made: the political branches should not be bound to carry out an aberrant, wrong, unjustifiable constitutional decision of the courts contrary to the Constitution and to the national interest. Where the courts fail miserably in exercising their supposed “unique strength” as constitutional interpreters, the competence argument for judicial supremacy collapses. Are the courts, over time and over a range of issues, more likely to be superior constitutional interpreters? *Perhaps*. But this scarcely supports a principle of unconstrained judicial supremacy. It supports at most a principle of deference, over time and over a range of issues, to the considered, well-reasoned judgments of the judiciary. But it also allows for the propriety of the political branches serving to check errant decisions of the Court that seriously depart from the Constitution.

In the end, Farber blinks. He cannot bear the implications of his own defense of judicial supremacy, and so ends up waffling incoherently as to whether or not Lincoln had a duty to follow *Dred Scott*. He offers this escape hatch from judicial supremacy in the instance of *Dred Scott*: “Given the degree of division within the Court, the confusing multiple opinions, and the analytical weakness of Taney’s opinion, *Dred Scott* arguably was not a definitive judicial resolution of the issue, as Lincoln himself argued in his Springfield speech about the case” (p 185). But if Farber means these factors seriously, his hypothesized exception swallows the judicial supremacy rule: *division* within the Court might mean any seriously contested decision that produced a dissent; *confusing multiple opinions* might mean any case with concurring rationales differing from the majority’s; and *analytical weakness* might well embrace any poorly reasoned (or simply wrong) judicial interpretation. If any of these factors (or best two out of three) obviates judicial supremacy, then Farber has stated that any and all analytically weak, confusing judicial decisions generating serious division on the Court need not be regarded as binding on the political branches. If that’s his proposition, I’ll take it.<sup>67</sup>

But plainly that is not what Farber has in mind. A sentence or two later he runs back home to judicial supremacy, stating that if a judicial rule “had been well settled, so that individuals had clearly de-

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<sup>67</sup> See generally Paulsen, 83 Georgetown L J 217 (cited in note 55).

financed legal rights, then Lincoln would have been bound to respect those rights" (p 185)—a formulation that many in the South would have thought (and the Supreme Court at the time would have thought) described *Dred Scott*. Two pages later yet, Farber claims that if Lincoln was really claiming a right to disregard judicial interpretations of the Constitution in carrying out his law enforcement duties as President, he would be "violating the legal rights of individual Southerners" and the South "would have had a valid complaint" (p 187). Then Farber zags again: Lincoln *could* sign legislation banning slavery in the territories, notwithstanding *Dred Scott*: "The importance of the slavery issue far outweighed the value of settling constitutional disputes efficiently, and the decision itself was so deeply flawed as to be entitled to little respect in its own right" (p 187). But Lincoln could only do this because *signing* a bill "would violate no one's legal rights" and "the legal process would offer protection against any actual violation of legal rights" (p 187)—presumably by striking down the unconstitutional statute. Yet Farber had said, just a few paragraphs before, that if a President knows "how a court will ultimately resolve a specific dispute within its competence," he must not "evade the legally inevitable outcome" (p 186). To "drag his heels in this situation" would be "lawless" (p 186). Is that clear?

The essential problem with Farber's position, in common with all defenses of judicial supremacy, is that it ultimately collapses either into a requirement of obedience to judicial decisions *no matter what* or into a coordinate power to refuse obedience to them whenever the relevant political actor is persuaded that the decision is wrong.<sup>68</sup> Farber defends the former position, does not like where it leads with respect to *Dred Scott*, but cannot bear the opposite view, and thus ends up teetering all over the place, before finally falling down in the judicial supremacy camp.

Lincoln experienced something of the same journey, but he ended up going in the opposite direction, and finally standing his ground relatively firmly against judicial supremacy. Earlier in his career, Lincoln had expressed great faith in "the law" and, at least by implication, in judicial authority.<sup>69</sup> *Dred Scott* upended that faith. Still, he clung to a view of the importance of adhering to judicial decisions, as a matter of precedent, and argued against having *Dred Scott* reaf-

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<sup>68</sup> I have developed this dilemma elsewhere. See Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 Cardozo L Rev 81 (1993).

<sup>69</sup> Donald, *Lincoln* at 80–81 (cited in note 9) (reporting that, in an 1838 speech to the Young Men's Lyceum, Lincoln called for "reverence for the laws" to be "the *political religion* of the nation").

firmed, confirmed, or extended.<sup>70</sup> That theme became increasingly strident in the Lincoln-Douglas debates of 1858, laden with suggestions that the *Dred Scott* decision was the product of a sinister conspiracy and suggesting the importance of being prepared to stand against adherence to any subsequent decision extending it.<sup>71</sup> By the time of his Inaugural, Lincoln's position was that judicial decisions are only law *for the particular case, and the parties to that case*, and are entitled to appropriate respect and consideration by the other departments of the national government—that is, that the other branches should take them for what they are worth. Within a few months, Lincoln erased even that line, refusing to abide by Chief Justice Taney's order in *Ex parte Merryman*<sup>72</sup> invalidating Lincoln's suspension of the privilege of the writ of habeas corpus, and declining to enforce Taney's granting of the writ and contempt order against one of Lincoln's generals.<sup>73</sup> Lincoln believed, and continued to believe,

<sup>70</sup> Abraham Lincoln, *Speech on the Dred Scott Decision at Springfield, Illinois* (June 26, 1857), in Fehrenbacher, ed., *Speeches and Writings, 1832–1858* 390, 392–95 (cited in note 51) (“We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this.”).

<sup>71</sup> See, for example, Lincoln, *First Debate, Lincoln's Reply* at 524–27 (cited in note 51); Abraham Lincoln, *Fifth Lincoln-Douglas Debate, Mr. Lincoln's Reply* (Oct 7, 1858), in Fehrenbacher, ed., *Speeches and Writings, 1832–1858* 701, 713–17 (cited in note 51); Abraham Lincoln, “House Divided” *Speech at Springfield, Illinois* (June 16, 1858), in Fehrenbacher, ed., *Speeches and Writings, 1832–1858* 426, 431–32.

<sup>72</sup> 17 F Cas 144 (Cir Ct Md 1861).

<sup>73</sup> Professor Farber discusses the *Merryman* case at pp 188–92, concluding (again, with some hand-wringing and uncertainty) that Lincoln was required to obey Taney's decree. I am one of the principal opponents in Farber's discussion, having written about the *Merryman* case and reached the opposite conclusion on the judicial supremacy point. Paulsen, 83 Georgetown L J at 343–45 (cited in note 55) (concluding that although “the *Merryman* Power is an extraordinary power reserved for extraordinary occasions,” it is “a lawful exercise of executive branch interpretive power”). The escape hatch Farber offers here is not the same as the one hypothesized for *Dred Scott* (that is, that the decision is badly wrong and incoherent on the merits). Instead, Farber speculates that a president might be permitted to refuse to enforce a judicial decree rendered by a court that lacked proper *jurisdiction* (pp 190–91):

[I]f the court's exercise of judicial power is a clear usurpation of authority over a case that it has no colorable claim to be hearing, or if the court's claim of jurisdiction invades some critical constitutional policy, then the president may not be obligated to obey. Regard for checks and balances should make us reluctant to go much beyond such extraordinary cases. But when a court acts without jurisdiction at the expense of critical constitutional values, presidential noncompliance coheres with our normal understanding of the binding effects of judicial decrees.

Thus, “[a]rguably, a valid suspension of the writ does eliminate the court's very power to proceed” (p 191). “Under this analysis, Lincoln's action in *Merryman* would not stand for any general right to disobey judicial decrees. It would stand only for a limited right to disobey decrees when the judge lacked the sheer power to issue a binding order” (p 192).

Farber's distinction does not hold up. In *Merryman*, the constitutional question was whether the President had constitutional power to suspend the privilege of the writ of habeas corpus. Taney said *No*. In short, he ruled that he *did* have jurisdiction. Why shouldn't Lincoln have been obliged to honor this judicial determination on a question of constitutional law? Either the judi-

notwithstanding Taney's opinion, that he had legitimate constitutional power to suspend the writ and that the suspension was necessary to the defense of the capital. Taney's opinion was wrong, Lincoln believed, and distinctly harmful to the safety of the nation. Under such circumstances, Lincoln thought himself not bound even by the judicial decree even in the particular case where rendered, where the executive and military were in effect parties to the case.<sup>74</sup>

The overriding principle guiding Lincoln's views with respect to judicial authority seems closely related to his views on state sovereignty and the validity of secession: *a part cannot be supreme over the whole, to the injury or destruction of the whole*. Just as the peculiar views of individual states cannot prevail over the sounder views of the nation as a whole, unsound decisions of the Supreme Court cannot prevail over the sounder constitutional views of the nation as a whole. In neither case can an idiosyncratic minority be permitted to dictate to the majority, to the damage of the nation. If it were otherwise, "the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal."<sup>75</sup>

Lincoln is, perhaps, slightly disingenuous when he says, in the next sentence, that there is not, "in this view, any assault upon the court, or the judges."<sup>76</sup> There *is* such an assault, and it is almost precisely parallel to his assault on state supremacy. One can see, from a distance of nearly a century and a half, that Lincoln was right with respect to the power of state governments—that a part cannot be permitted to dictate to the whole. We see less clearly that Lincoln was right with respect to the power of the courts—that judicial supremacy entails the same fundamental difficulty of permitting one branch of government to dictate constitutional interpretation to the whole, to its destruction.<sup>77</sup>

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ary's determination of legal questions is binding on the executive or it is not. If it is binding, it should be binding when the determination involves a legal issue of jurisdiction, just as it should when the determination involves some other legal issue. If a court's ruling as to its power to proceed is flagrantly wrong, how is that different from some other exercise of judicial power that is flagrantly wrong? In both instances, to borrow Farber's words, "the court's exercise of judicial power is a clear usurpation of authority over a case" (p 190). Why should erroneous decisions as to jurisdiction or justiciability be treated differently from erroneous decisions that involve ultra vires exercises of judicial power in some other respect? See Paulsen, 15 Cardozo L Rev at 105 (cited in note 68) ("There is no sound reason to suppose that the President has any greater power to refuse to execute judgments he thinks erroneous on justiciability grounds than he does to refuse to execute judgments he thinks erroneous on other legal grounds.").

<sup>74</sup> See generally Paulsen, 15 Cardozo L Rev 81 (cited in note 68).

<sup>75</sup> Lincoln, *First Inaugural Address* at 221 (cited in note 2).

<sup>76</sup> *Id.*

<sup>77</sup> That the two issues converge can be seen by posing a simple hypothetical. If the Taney Court had held, in an action brought by, say, Virginia against the United States, that secession was lawful and that Lincoln's constitutional view of Union was wrong, would Lincoln have been

## V. "[M]EASURES, OTHERWISE UNCONSTITUTIONAL . . ."

The Civil War was a crucible in which was forged important early answers to persistent, enduring constitutional questions about presidential power, military power, military tribunals, and individual rights. It was also the crucible in which was forged Lincoln's most controversial constitutional theory: that the law of necessity is an operative principle of the Constitution, governing how specific provisions of the document are to be understood, how they apply in time of war or emergency, and even whether they apply at all. Must specific constitutional provisions sometimes yield to the necessity of preserving the nation? Lincoln's view was that the Constitution itself so required. "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it."<sup>78</sup>

It is fashionable, at least in academia, to say that Lincoln was wrong: it is utterly wrong, and destructive of the constitutional order, to violate the Constitution on the pretext that doing so is justified in order to save the Constitution. That is the burden of Farber's chapters on Lincoln's violations of individual rights (Chapter 7) and on "The Rule of Law in Dark Times" (Chapter 8). Farber makes a convincing case for how deeply problematic Lincoln's views and actions were. Once again, however, there is a convincing case for siding with President Lincoln against Professor Farber. The position is full of difficulties as a practical matter, and is unquestionably dangerous in the wrong hands, but Lincoln's logic of constitutional priority is, in principle, flawless. *A part cannot control the whole, to the destruction of the whole.* Just as states may not dictate to the Union, to the destruction of the Union; and just as courts may not dictate to the nation on constitutional interpretation, to the destruction of the Constitution; so too, specific provisions of the Constitution must be interpreted in light of the need to preserve the constitutional order as a whole, lest interpretation or enforcement of a particular provision be permitted to destroy the Constitution as a whole. *As a matter of constitutional law*, the Constitution is not a suicide pact. Its provisions should not be interpreted in such a way as to make it one.<sup>79</sup>

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obliged to honor the decree, vacate the White House, and remove the capital to some point north of the Mason-Dixon line? Farber's bottom line appears to be that, as long as the Court had jurisdiction, the answer is Yes.

<sup>78</sup> Abraham Lincoln, *To Albert G. Hodges* (Apr 4, 1864), in Fehrenbacher, ed., *Speeches and Writings, 1859–1865* 585, 585 (cited in note 2).

<sup>79</sup> For further development of the ideas in this section, see Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L Rev (forthcoming 2004).

They need not be. For Abraham Lincoln, the first duty of the President of the United States was, in the words of the Constitution's presidential oath of office, to "preserve, protect and defend the Constitution of the United States"<sup>80</sup> by preserving the nation—the fundamental constitutional order—created by that Constitution. The necessity of preserving the nation was the first obligation of faithfulness to the Constitution. The specifics of the Constitution might have to bend so that the nation created by that Constitution might not break.

Lincoln's understanding of the obligation created by the presidential oath, and the duty it imposes to "preserve, protect and defend" not only a Constitution, but the United States of America, is key to understanding much of what he did as President. As noted above, Lincoln fought the Civil War out of a sense of constitutional obligation—a duty to preserve the nation and his Office and to pass along both, unimpaired, to a successor. Because secession violated, according to Lincoln, the most basic principles of the Constitution and of elected government, it became his sworn constitutional duty, as chief executive, to suppress such unlawful insurrections and enforce the Constitution and laws of the United States. "*You* have no oath registered in Heaven to destroy the government, while *I* shall have the most solemn one to 'preserve, protect and defend' it," Lincoln warned the South in the First Inaugural.<sup>81</sup> He thus shifted the burden to the South: "In *your* hands, my dissatisfied fellow countrymen, and not in *mine*, is the momentous issue of civil war."<sup>82</sup>

The South chose. And the war came. Lincoln's understanding of his constitutional duty then became that he must *win* the war in order to preserve, protect, and defend the Union. This required him—*constitutionally* required him—to do what was necessary to win, even if it meant the temporary sacrifice, during wartime, of other constitutional values. The duty to preserve the nation supplied an overarching rule of presidential constitutional interpretation: specific provisions of the Constitution should not be read so as to defeat the fundamental purpose and goals of the Constitution or to risk the destruction of the nation. The need to preserve the constitutional order thus operates as a rule of construction for other constitutional provisions.

That was the essence of Lincoln's legal argument for unilateral presidential power to suspend the privilege of habeas corpus in 1861, and to defy Chief Justice Taney's order purporting to invalidate the suspension, in the case of *Ex parte Merryman*. Lincoln had suspended

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<sup>80</sup> US Const Art II, § 1, cl 8.

<sup>81</sup> Lincoln, *First Inaugural Address* at 224 (cited in note 2).

<sup>82</sup> *Id* at 223.



the writ on his own, thinking it necessary to enable Union troops to traverse unfriendly border-state cities in order to save the capital, and the nation, from falling to the rebellion. Chief Justice Taney, entertaining a petition for habeas corpus, held that the writ suspension power was Congress's alone, by virtue of the Necessary and Proper Clause, the location of the Constitution's *limitation* on suspension of the writ in Article I, Section 9 (immediately following the itemization of Congress's legislative powers), and the writ's historical origin and purpose as a limitation on the exercise of arbitrary power by the executive.<sup>83</sup>

Under ordinary circumstances, Taney might have had the better of the argument (though even then not by an overwhelming margin). But under the actual circumstances, Lincoln's position was compelling and sensible. He started, famously, with the constitutional imperative of national survival and his oath as President:

To state the question more directly, are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?<sup>84</sup>

The interpretive principle of necessity—that the Constitution should not be construed in a self-destructive manner—then informed Lincoln's reading of the writ suspension clause: "It was not believed that any law was violated," Lincoln wrote.<sup>85</sup> The writ suspension clause was tantamount to authorization to suspend the writ when, in cases of rebellion, public safety requires it; the Constitution does not explicitly say who is to exercise the power; the provision was "plainly made for a dangerous emergency"; and "it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion."<sup>86</sup>

It was similarly the principle of constitutional necessity—the imperative of winning the war and preserving the Union—that led Lincoln to issue the Emancipation Proclamation freeing the slaves in the South. Lincoln did not think the Proclamation within his power simply because of the immorality of slavery. It was, rather, a war measure that would not have been constitutionally justified in peacetime. It

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<sup>83</sup> *Ex parte Merryman*, 17 F Cas at 148–53.

<sup>84</sup> Lincoln, *Message to Congress in Special Session* at 253 (cited in note 5).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

was, quite literally, the seizure and confiscation of enemy “property” in order to demoralize the enemy and starve it of resources, so as to help defeat it. The Proclamation did not apply—could not apply, in Lincoln’s constitutional understanding—in loyal Union states that sanctioned slavery.

Lincoln’s best explanation of his actions, with respect to emancipation specifically, and with respect to the conduct of the war generally, came in a public letter to Senator Albert G. Hodges of Kentucky, recounting remarks he had made in a private meeting with the Senator and others. The letter, near the end of Lincoln’s first term, and barely a year before his death, captures Lincoln’s constitutional philosophy quite well. I have already quoted a fragment, but the entire passage merits quotation:

I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. I can not remember when I did not so think, and feel. And yet I have never understood that the Presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling. It was in the oath I took that I would, to the best of my ability, preserve, protect, and defend the Constitution of the United States. I could not take the office without taking the oath. Nor was it my view that I might take an oath to get power, and break the oath in using the power. I understood, too, that in ordinary civil administration this oath even forbade me to practically indulge my primary abstract judgment on the moral question of slavery. . . . I did understand however, that my oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law. Was it possible to lose the nation, and yet preserve the constitution? By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together.<sup>87</sup>

It’s all there: oath, duty, and necessity. (And, by implication, Lincoln’s views of slavery, of Union, and of judicial authority.) The con-

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<sup>87</sup> Lincoln, *To Hodges* at 585 (cited in note 78).

stitutional requirement of the oath obligated Lincoln to defend the Constitution as he understood it, including his understanding of the perpetuity of the Union and the attendant presidential duty to maintain that Union and execute the laws in every state thereof. That duty was personal. He could not resign it into the hands of the Supreme Court, nor could he yield to force or threats of force by the states in rebellion. He was bound by that duty even when it ran contrary to his strong personal views.

But that duty also supplied a constitutional imperative, and a template, for how all other constitutional provisions must be interpreted and applied. Lincoln did not believe that circumstances might justify violating the Constitution; he believed that the Constitution itself supplied a meta-interpretive principle of necessity, justifying—*constitutionally* justifying—subordination, temporarily, of specific provisions: “I felt that measures, *otherwise* unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”

Lincoln followed this principle of constitutional necessity relentlessly and, it must be conceded, sometimes erred in his application of it—or at least so it seems, with the aid of nearly a century and a half of hindsight. Farber documents actions of Lincoln (and his generals) that most observers today would regard as violations of the freedom of speech and the due process rights to trial by civilian courts and by jury.

But is it really so easy to conclude that Lincoln’s actions were unconstitutional, even in these instances, if Lincoln’s assessment at the time was correct, that such actions were, in the main, justified by the necessity of preserving the Constitution by first preserving the nation *constituted* by that document? Even modern legal doctrine has generated myriad “compelling interest” tests in which courts have discovered exceptions, implied out of necessity and practicality, from seemingly absolute constitutional provisions.<sup>88</sup>

Professor Farber is fair and balanced in his assessment of Lincoln’s record concerning individual liberties, resisting the temptation to be too harshly critical. But is there not something deficient in a constitutional analysis that sees mostly trees and not much forest? In this respect, one can see Lincoln’s greatness not only as a practical

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<sup>88</sup> The Supreme Court’s cases are loaded with “compelling state interest” exceptions or tests in the areas of freedom of speech, free exercise of religion, equal protection, and due process of law. A Westlaw search for “compelling interest” (somewhat overinclusive and also somewhat underinclusive) produced 272 documents in the Supreme Court database. Some such cases are convincing in theory and in practice, some are convincing in theory but not in how they are applied, and some are unconvincing both in theory and in application. People differ as to which cases fall in which categories.

leader, but also *as a constitutional theorist*, operating at a level a notch higher yet even than the most brilliant legal scholars of a century and a half later. Lincoln's logic is relentless and powerful, as well as practical; his judgment that the part must yield to the whole—an insight common to Lincoln's view of the Union, to his view of judicial authority, and to his view of constitutional survival and necessity as a meta-principle of constitutional interpretation—is deductive reasoning at its best. Specific provisions of the Constitution must be interpreted and applied in light of the imperative of preserving the Constitution as a whole, through preservation of the nation. The argument can misfire in its application—Presidents can be mistaken as to how it applies in particular situations;<sup>89</sup> the Supreme Court likewise can be mistaken as to what is a “compelling interest” justifying measures otherwise unconstitutional.<sup>90</sup> The argument is dangerous. Its applications will almost always be contestable. But can one really say that the logic of the argument is wrong?

#### CONCLUSION

If the Civil War must be judged the most important event of constitutional interpretation in our nation's history, Lincoln must be judged the most important, influential constitutional interpreter and expositor our nation has ever known—beating out, by a fair distance, his next nearest rivals, Alexander Hamilton, John Marshall, James Madison, William Brennan, and Earl Warren. On the question of Union and sovereignty—arguably the most fundamental contested question of constitutional structure—our view of the Constitution is Lincoln's more than anyone else's, and flows from Lincoln's actions and resolve more than anyone else's. On the question of presidential power, our view of the Constitution flows from Lincoln's maximization of the constitutional powers of the office, at a time when circumstances required their use, more than from any other President's actions and far more than from any judicial decision. Our view of presidential duty to the nation comes (probably without our understanding of its source) from Lincoln, too. Even where Lincoln's views were derivative from those of others, it is Lincoln who expressed them best and made them, truly, the law of the land.

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<sup>89</sup> Witness President Harry Truman's actions in seizing the nation's steel mills in 1952, leading to the Court's decision in *Youngstown*, 343 US 579.

<sup>90</sup> Witness the Court's ratification of the actions of President Franklin D. Roosevelt and Congress in internment Japanese-Americans during World War II. See *Korematsu v. United States*, 323 US 214 (1944); *Hirabayashi v. United States*, 320 US 81 (1943). But see Patrick Gudridge, *Remember Endo?*, 116 Harv L Rev 1933 (2003) (attempting to resuscitate *Endo*, the neglected companion case to *Korematsu* that held the relocation camps to be unlawful).

On other issues, Lincoln's interpretations of the Constitution do not currently prevail (judicial supremacy being a prominent example). But even on these, Lincoln's views are powerful and usually stand as a powerful intellectual critique of views more widely held today. One can only hope that Professor Farber's book will begin a rekindling of interest in the most seriously neglected constitutional scholar and theorist of all time. For, in the main, Lincoln's Constitution is the Constitution we have today; and where it is not, it ought to be.

